No. 91-269

FILED
SEP 9 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

vs.

WILLIAM MCKINNEY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALASKA, ARKANSAS, FLORIDA, GUAM, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MAINE, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONERS

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Amicus Curiae State of Hawaii

[Other Counsel of Record Listed on Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Hon. Charles E. Cole
Attorney General of Alaska
Department of Law
P.O. Box K
Juneau, Alaska 99811
(907) 465-3600

Hon. Winston Bryant
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-2007

Hon. Robert Butterworth
Attorney General of Florida
The Capitol
Tallahasee, Florida 32395
(904) 487-1963

Hon. Elizabeth Barrett-Anderson
Attorney General of Guam
Department of Law
Suite 701
238 Archbishop F.C. Flores Street
Agana, Guam 96910
(671) 472-6814

Hon. Larry Echohawk
Attorney General of Idaho
State House, Room 210
Boise, Idaho 83720
(208) 334-2400

Hon. Roland W. Burris
Attorney General of Illinois
100 West Randolph
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Hon. Robert T. Stephan
Attorney General of Kansas
Office of the Attorney General, 2d Floor
Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2215

Hon. William J. Guste, Jr.
Attorney General of Louisiana
Department of Justice
P.O. Box 94095
Capitol Station
Baton Rouge, Louisiana 70804-9095
(504) 342-8495

Hon. Michael E. Carpenter
Attorney General of Maine
State House, Station 6
Augusta, Maine 04333
(207) 289-3661

Hon. William L. Webster
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Hon. John P. Arnold
Attorney General of New Hampshire
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

Hon. Tom Udall
Attorney General of New Mexico
P.O. Drawer 1508
Sante Fe, New Mexico 87504-1508
(505) 827-6014

Hon. Lacy H. Thornburg
Attorney General of
North Carolina
P.O. Box 629
Raleigh, North Carolina
27601
(919) 733-7188

Hon. Nicholas J. Spaeth
Attorney General of
North Dakota
600 East Boulevard
Bismarck, North Dakota
58505
(701) 224-2210

Hon. Ernest Preate, Jr.
Attorney General of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, Pennsylvania
17120
(717) 787-3391

Hon. T. Travis Medlock
Attorney General of
South Carolina
P.O. Box 11549
Columbia, South Carolina
29211
(803) 734-3970

Hon. Mark Barnett
Attorney General of
South Dakota
Office of the Attorney
General
500 E. Capitol
Pierre, South Dakota
57501-5070
(605) 773-3215

Hon. Charles W. Burson
Attorney General of
Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243
(615) 741-6474

Hon. Mary Sue Terry
Attorney General of Virginia
101 North 8th Street
Richmond, Virginia 23219
(804) 786-2435

Hon. Mario J. Palumbo
Attorney General of
West Virginia
State Capitol
Charleston, West Virginia
25305
(304) 348-2021

Hon. Joseph B. Meyer
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. The Issue of Whether the Cruel and Unusual Punishment Clause Requires Prison Administrators to Accommodate the Smoke-free Air Preferences of Non-smoking Inmates Raises an Extremely Important Question of Federal Constitutional Law that Has Not Been but Should be Decided by this Court 3

II. The Ruling Below is in Conflict with Decisions of Other Courts of Appeals 5

III. The Ruling Below Violates the Express Holding of this Court's Recent Eighth Amendment Decision in *Wilson v. Seiter* by Failing to even Address the Requirement of "Deliberate Indifference" and because Plaintiff Failed to Establish such Deliberate Indifference 6

IV The Ninth Circuit's Holding that Nevada's Anti-Smoking Statute Creates a Liberty Interest Protected by the Due Process Clause is Dependent Upon the Doubtful Proposition that Substantive Due Process Rights Can be Derived from State Law 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Bell v. Wolfish, 441 U.S. 520, 547 (1979) 2

Caldwell v. Quinlan, 729 F. Supp. 4 (D.D.C.), *aff'd.*, 923 F.2d 200 (D.C. Cir. 1990) 6

Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989) 6

McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991) 7

Paul v. Davis, 424 U.S. 693, 701 (1976) 10

Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) 9

Rhodes v. Chapman, 452 U.S. 337, 346 (1981) 5

Steading v. Thompson, No. 90-2588 (7th Cir. August 19, 1991) 5

Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989) 5

Wilson v. Seiter, 59 U.S.L.W. 4671 (U.S. June 17, 1991) 3, 6, 7, 8, 10

No. 91-269

In The

Supreme Court of the United States

October Term 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

vs.

WILLIAM MCKINNEY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALASKA, ARKANSAS, FLORIDA, GUAM, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MAINE, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONERS

The amici States enumerated above, by their respective Attorneys General, submit this brief in support of the petition for certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Attorney General of Nevada from the judgment entered in the proceeding below on February 1, 1991.

INTEREST OF THE AMICI CURIAE

This Court has recognized that "[p]rison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The amici States, therefore, have a significant interest in seeing that their administrative discretion to manage and operate their prison and jail facilities in the most efficient and effective manner consistent with legitimate security concerns not be unduly hampered by court-imposed orders requiring them to either ban smoking completely in prison or segregate prisoners according to their smoking or non-smoking preferences. Serious security problems could arise under either scenario, as a complete ban would physically and psychologically disturb many smoking prisoners, making them more prone to violent behavior, while attempting to segregate inmates according to smoking status could require ignoring important security concerns in assigning detainees to various cells.

Furthermore, the amici States have a very significant interest in holding down the immense costs of building and operating prisons and jails within their states. The decision below, if allowed to stand, would likely lead to even greater drains on State treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations. A complete ban on smoking, on the other hand, would require more medical personnel to treat addicted smokers suffering withdrawal symptoms and/or more prison guards to deal with the likely increase in prison unrest.

SUMMARY OF THE ARGUMENT

This Court should grant the writ of certiorari in this case because the decision below determined a significant issue of Federal Constitutional law that has not been decided by this Court, and will have a severe impact upon the States' financial status, prison administration and security, and the welfare of the prisoners themselves. Furthermore, the ruling below is in direct conflict with numerous decisions of other Federal Courts of Appeals rejecting identical or similar cruel and unusual punishment claims. Most significantly, the Ninth Circuit's decision plainly violates this Court's recent ruling in *Wilson v. Seiter*, 59 U.S.L.W. 4671, 4673 (U.S. June 17, 1991), by failing to even address the requirement of "deliberate indifference," and because plaintiff failed to establish such deliberate indifference in any event. Finally, the Ninth Circuit's separate decision holding that the Nevada anti-smoking statute creates a liberty interest in smoke-free prison libraries protected by the Due Process Clause unjustifiably expands *substantive* due process protection to interests created solely by State law.

ARGUMENT

I. The Issue of Whether the Cruel and Unusual Punishment Clause Requires Prison Administrators to Accommodate the Smoke-free Air Preferences of Non-smoking Inmates Raises an Extremely Important Question of Federal Constitutional Law that Has Not Been but Should be Decided by this Court.

As just described above, the impact of the decision below on the fiscal solvency of the states and the security

of their prison facilities is potentially very severe. Because the proportion of smokers in prisons nationwide is around 90%, *see* N.Y. Times, July 9, 1990 at A10, col. 5, virtually all prisons across the country will be faced with major institutional and/or economic crises if nonsmoking prisoners can demand smoke-free, or less smoky, air. For this reason alone, putting aside the important constitutional question, certiorari should be granted to review a decision having such potentially devastating consequences.

The constitutional question of whether it is cruel and unusual punishment to subject prisoners to levels of cigarette smoke that cause them no immediate or short-term ill effects, on the ground that it might endanger their health at some unspecified point in the future, is an important one that has not been addressed by this Court. In light of the 90% smoking rate among inmates, thousands of non-smoking inmates are potentially being subjected to significant levels of second-hand tobacco smoke and thus they, too, have an interest in having this question resolved finally by this Court. Indeed, *all* prisoners will be greatly affected by resolution of this important issue, as a ruling upholding the decision below could lead to smoking bans which would be stressful and disturbing to the majority smoking inmates, and which not inconceivably could raise its own cruel and unusual punishment questions.

In short, certiorari should be granted so that this Court can resolve a constitutional problem that is currently having, and will continue to have, a most severe impact upon state fiscal responsibility, prison security, and the welfare of the prisoners themselves.

II. The Ruling Below is in Conflict with Decisions of other Courts of Appeals.

The decision below is in direct and irreconcilable conflict with a decision issued just three weeks ago by the United States Court of Appeals for the Seventh Circuit in *Steading v. Thompson*, No. 90-2588 (7th Cir. August 19, 1991). Judge Easterbrook, writing for a unanimous court, rejected a prisoner's claim that his forced exposure to second-hand tobacco smoke in prison violates the Cruel and Unusual Punishment Clause because the plaintiff had failed to establish that the prison officials intended the passive smoke as punishment to him.

Because McKinney brought forth no evidence to suggest that the Nevada prison officials intended his exposure to second-hand smoke, along with its potentially deleterious health effects, as punishment, the Seventh Circuit, in light of its ruling in *Steading*, would clearly have reached the opposite result in the case at bar.

Other Courts of Appeals have also reached decisions that conflict, in varying degrees, with the ruling below. In *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989), the Fifth Circuit Court of Appeals rejected a prisoner's claim that forced passive exposure to cigarette smoke in prison was cruel and unusual punishment. Although relying primarily on res judicata principles (plaintiff having already lost an earlier similar claim), the Court concluded that "evolving standards of decency that mark the progress of a maturing society," *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), had not yet reached the point of condemning forced exposure to second-hand smoke. 878 F.2d at 851.

The United States Court of Appeals for the District of Columbia Circuit affirmed, without opinion, the District Court decision in *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd*, 923 F.2d 200 (D.C. Cir. 1990), rejecting an inmate's claim of cruel and unusual punishment based upon his forced exposure to second-hand smoke in prison. The District Court essentially reasoned that "standards of decency" had not yet evolved to the point of forbidding forced prisoner exposure to passive smoke. 729 F. Supp. at 6-7.

There is also substantial Federal *District* Court precedent rejecting the position taken by the Ninth Circuit below. *See, e.g., Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989) (rejecting prisoner's claim that his forced exposure to second-hand smoke is cruel and unusual punishment).

This Court, therefore, should grant the petition for certiorari for the additional purpose of resolving the conflict among the different federal circuits.

III. The Ruling Below Violates the Express Holding of this Court's Recent Eighth Amendment Decision in *Wilson v. Seiter* by Failing to even Address the Requirement of "Deliberate Indifference" and because Plaintiff Failed to Establish such Deliberate Indifference.

This Court decided just last term that in order for conditions of confinement in a prison to constitute cruel and unusual punishment, the plaintiff must establish, in addition to the objective element of a sufficiently serious

harm, a subjective element, namely, that the prison officials were "deliberately indifferent" to the harm caused the inmate. *Wilson v. Seiter*, 59 U.S.L.W. 4671, 4673 (U.S. June 17, 1991). The Ninth Circuit's decision plainly violated *Seiter*'s mandate in two ways.

First, the Ninth Circuit did not even address the subjective component of "deliberate indifference" as applied to its main holding that forced exposure to levels of passive smoke that pose an unreasonable risk of future harm to an inmate's health violates the Eighth Amendment.[1] The Court, in direct violation of *Wilson v. Seiter*, simply ignored that requirement and instead analyzed only the objective question of the seriousness of the harm. For this reason alone, and given that *Seiter* was not decided until after the Ninth Circuit's decision came down, this Court should, at the very least, grant certiorari, vacate the Ninth Circuit's decision, and remand to the Ninth Circuit for reconsideration in light of *Wilson v. Seiter*. This will ensure that lower federal courts follow this Court's explicit mandate in *Seiter* that "deliberate indifference" is a prerequisite to finding an Eighth Amendment violation.

Second, this court should in fact *reverse* the Ninth Circuit's ruling because the plaintiff clearly failed to

---

[1] The Ninth Circuit only addressed the requirement of "deliberate indifference" as to McKinney's very separate Eighth Amendment claim that the second-hand smoke was aggravating his *existing* medical symptoms, as opposed to his claim regarding the as-yet-unrealized risk of *future* harm. *See McKinney v. Anderson*, 924 F.2d 1500, 1511 & n.33 (9th Cir. 1991).

establish the requisite "deliberate indifference." Although there was evidence that the prison officials were made aware of McKinney's complaint about exposure to passive smoke and did not take any steps that succeeded in reducing McKinney's exposure, there was no evidence presented that the prison officials knew or should have known that second-hand smoke poses a serious health hazard. Indeed, whether passive smoking is a serious health threat is to this day a hotly debated subject. Although the Surgeon General's Report of 1986 does suggest that exposure to second-hand smoke creates such a danger, there was no evidence presented that the Nevada prison officials were even aware of that report, or had reason to believe that Report's conclusions as opposed to the findings of other studies disputing the harm caused by passive smoke.

Without evidence of knowledge by Nevada officials of the hazards of second-hand smoke, it simply cannot be said that those officials were deliberately indifferent to McKinney's health. Nevada officials, by not taking steps to reduce or eliminate McKinney's exposure to passive smoke, were at best deliberately indifferent to his desire to be *free of passive smoke exposure*, which, absent any knowledge on their part that such exposure is dangerous to his health, does not constitute deliberate indifference to his *health*.

Therefore, given plaintiff's complete evidentiary failure to satisfy *Seiter*'s express requirement of a showing of "deliberate indifference," this Court should grant certiorari, and reverse the judgment below, to the extent it allowed plaintiff to proceed on his Eighth Amendment claim.

IV. The Ninth Circuit's Holding that Nevada's Anti-Smoking Statute Creates a Liberty Interest Protected by the Due Process Clause is Dependent Upon the Doubtful Proposition that Substantive Due Process Rights Can be Derived from State Law.

The Ninth Circuit, in addition to its Eighth Amendment ruling, held that the Nevada anti-smoking statute, limiting smoking in certain specific public places, applied to prison libraries and therefore created a liberty interest in smoke-free prison libraries that is protected by the Due Process Clause. However, this Court has refused to recognize *substantive* due process protection for interests created by state law. In *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 222-23 (1985), this Court assumed, *without deciding*, that a particular substantive due process right, allegedly arising out of state law, existed, and instead rejected the claim on its merits. Most significantly, however, Justice Powell, in his concurring opinion, concluded that:

> While property interests are protected by *procedural* due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *substantive* due process rights are created only by the Constitution.

Ewing, 474 U.S. at 229 (Powell, J., concurring) (emphasis added). This position was not refuted by the majority opinion.

Therefore, because the Ninth Circuit's Due Process holding depends upon the dubious proposition, in light of *Ewing*, that State law can create liberty interests protected by *substantive* due process, this Court should grant certiorari to reject such an unwarranted expansion of substantive due

process that threatens to turn the Constitution into a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

CONCLUSION

For the foregoing reasons, the amici States respectfully request that this Court grant the petition for writ of certiorari filed by the Attorney General of Nevada, and reverse the judgment below to the extent it allowed plaintiff to proceed on his Eighth Amendment and Due Process claims. As an alternative to *reversing* the judgment on the Eighth Amendment claim, this Court should at least grant certiorari and *vacate* the judgment on the Eighth Amendment claim, and remand for reconsideration in light of *Wilson v. Seiter*.

Dated: Honolulu, Hawaii, September 9, 1991.

Respectfully submitted,

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Amicus
Curiae State of Hawaii

[Other Counsel of Record
Listed on Inside Cover]